80-1059

Supreme Court, U.S.
FILED
DEC 22 1980
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. _____

LESLIE H. ALLOTT, JR.,
Petitioner

v.

RAYMOND SICINSKI, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

LELSIE H. ALLOTT, JR.,
Petitioners,

v.

RAYMOND SICINSKI, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

The petitioner LESLIE H. ALLOTT, JR., respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit entered in its proceeding on September 23, 1980.

QUESTION PRESENTED

Whether a complaint can be amended at least once, as a matter of right, where only non-responsive pleadings are filed by the defendants.

PARTIES

There were 53 parties in the Court of Appeals for the Seventh Circuit. Their names are listed in Footnote 1.

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1 The names of the parties are: Plaintiff: LESLIE H. ALLOTT, JR.; Defendants (52): Raymond Sicinski, Carl Sicinski, Dan Cromp, Fred Breen, Joseph Trizna, Fred Richards, Larry Walsh, Robert Weidling, Steven Luzbetak, County of Will, City of Joliet, William Lipsey, James Gale, Helen Herschberger, Robert Quigley, Charles Gaines, R. C. Schumacher, L. Keith Watson, Glenn Coburn, Betty Perrino, Robert Condon, Herman Alberico, Thomas McDonald, Jerry Capps, Robert Olson, Ruth Kennedy, William Starner, Anthony Lilek, Ted Grabavoy, Frank Planka, Albert Spiers, Robert Hacker, Clifford Sinclair, Andrew Hinch, Norman Keck, Joseph Cusimano, Peter Pastore, Dan Tezak, Joseph Shetina, George Tapella, John Dourg, E.R.S. Security and Detective Agency, Inc., Earnest Bell, David J. Blum, Harry McSteen, Joseph Costello, Craig Greenwood, Francis Loughran, George Troha, Edwin Brown,

Robert McKnelly and The Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois.

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OPINIONS BELOW

The opinion of the Court of Appeals, unpublished, appears in the Appendix at page 7a. The opinion of the District Court was delivered orally; an edited transcript of this opinion appears in the Appendix at page 32a.

JURISDICTION

On June 19, 1980 the Court of Appeals for the Seventh Circuit entered a judgment adverse to the petitioner, affirming the U.S. District Court's judgment dismissing petitioner's complaint; after granting one enlargement of time for petitioner to file a petition for rehearing, the Court of Appeals summarily, without opinion, denied petitioner's motion for rehearing by written order entered on September 23, 1980. Jurisdiction to review the judgment of September 23, 1980 of the Court of Appeals is conferred on this Court by 28 USC 2101(c):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

STATUTORY PROVISIONS INVOLVED

Federal Rules on Civil Procedure.

Rule 15(a). Amended Pleadings:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the

amended pleading, whichever period may be the longer, unless the court otherwise orders."

STATEMENT OF THE CASE

On November 27, 1978 petitioner filed a civil suit in the proper U.S. District Court in Illinois for damages for violations of the Civil Rights Act of 1871, 42 USC 1983, by certain Joliet city police officers, deputy sheriffs of Will County, Illinois, Joliet city officials and officials of Will County Illinois; petitioner also invoked this statute in seeking injunctive relief against the Illinois Attorney Registration and Disciplinary Commission. The basis for federal jurisdiction in the court of first instance is 28 USC 1343. Illinois state law claims for breach of contract and legal malpractice were appended to the § 1983 claim under the doctrine of pendent party jurisdiction against several attorneys and

detective agencies whom petitioner had previously hired and fired. Of the defendants who responded to the complaint, all filed motions to dismiss for failure to state a claim pursuant to FRCP 12(b)(6). The District Court set briefing schedules on all these motions except one. On January 18, 1979, in responding to the brief of defendant Edwin M. Brown, petitioner requested permission of the Court to amend the complaint to which the Court made no reply. Then, again, on February 12, 1979, petitioner, in responding to the brief of defendant Harry McSteen, asked permission of the Court to amend the complaint to which the Court again, made no reply. On September 28, 1979, six months after the last of the motions to dismiss was briefed, the District Court delivered an oral opinion in which it dismissed the complaint in its entirety with prejudice; no mention was

made in the Court's opinion of amending the complaint. Also on September 28, 1979 the Court filed a Form 32 "Judgment on Decision by the Court" authorized by FRCP 84 for inclusion in the APPENDIX of FORMS; no mention was made in this form judgment of amendments to the complaint. Further, the Court filed a "Minute Order" dated September 28, 1979 which dismissed the complaint in its entirety, as to all defendants, with prejudice, but made no mention of amendments. On September 28, 1979 petitioner ordered an expedited transcript of the Court's oral opinion of September 28, 1979; this transcript was received by petitioner on October 9, 1979. On October 11, 1979 petitioner mailed to the Court and the attorneys of record a MOTION FOR LEAVE TO AMEND PLAINTIFF'S COMPLAINT which was received by the Court on October 15, 1979; this motion was heard

on October 23, 1979 and denied. The District Court's basis for denying the motion to amend was its alleged untimeliness since it was filed more than 10 days after judgment - the District Court treating the motion as a motion to vacate or modify a judgment and thus w/i the purview of FRCP 59(e). On October 25, 1979 petitioner timely filed a Notice of Appeal with the U.S. District Clerk appealing the District Court's judgment to the Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed without oral argument, the District Court's dismissal and denied petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

A FEDERAL COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED OR USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER

FEDERAL COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Seventh Court has consistently held that since a motion to dismiss is not a responsive pleading under FRCP 15(a) a plaintiff has an absolute right to amend his complaint. Leave to amend is not required, but if asked for, it is error to deny it.

In Fuhrer v. Fuhrer, 292 F.2d 140 (CA 7, 1961), The Seventh Circuit expressly held that a plaintiff has an Absolute right to file an amended complaint prior to a responsive pleading, even if the complaint has been dismissed by the court. The Court in that case stated (at page 142):

> "A literal reading of Rule 15(a) might suggest that a plaintiff would be entitled as of right to one amendment to his complaint without any limit of time, despite the filing of a motion to dismiss. This has led some courts and commentators to interpret Rule 15(a) as subject to the qualification that the

plaintiff may not amend after the court has dismissed the complaint except upon leave of the court. United States v. Newbury Mfg. Co., 1 Cir., 123 F.2d 453; Kelly v. Delaware River Joint Commission, 3 Cir. 187 F.2d 93; 3 Moore, Federal Practice § 15.07, page 826 (2d ed. 1948).

This court has taken a more liberal view of Rule 15(a). In the Peterson Steels case, supra, the action was for breach of contract. The District Court sustained the motion to dismiss. Plaintiff thereafter filed a motion for leave to file an amended complaint. The District Court denied the motion saying the proposed complaint was essentially the same as the one originally filed. This Court said, at page 194 of 188 F.2d: "As defendants had not served a responsive pleading, plaintiff was entitled to file his amended complaint as a matter of course and was not required to ask leave of court; it was error, however, to deny such leave when the request was made. (emphasis supplied).

In Peckham v. Scanlon, 241 F.2d 761, 764, this Court approved a liberal interpretation of Rule 15(a), and at page 764 said, "This court in Peterson Steels, Inc. v. Seidmon, 7 Cir., 188 F.2d 193,

194, recognized the rule as conferring an absolute right to amend." (emphasis supplied).

The Seventh Circuit in Peckham v. Scanlon, 241 F.2d 761 (CA 7, 1952, Case 1) said at pages 764-5:

Case 1) said at pages 764-5:

". . . this court in Peterson Steels, Inc. v. Seidman, 7 Cir., 188 F.2d 193, 194, recognized (FRCP 15(a) as conferring an absolute right to amend (where no responsive pleading has been filed). The Sixth Circuit in Rogers v. Girard Trust Co., 159 F. 2d 235, 241, appears to have appraised the rule in the same manner. In fact, the positive language of the rule appears to leave no room for interpretation or construction other than it confers an absolute right, of which the pleader cannot be deprived. The general rule relied upon by the Defendants (that if the decision below is correct, it must be affirmed), if applied to the instant situation, would amount to an emasculation of Rule 15(a) . . . . (W)e are not unmindful of Defendants' contention that not only does the complaint fail to state a cause of action but that there is no possibility that a cause can be stated taking into

> consideration the nature of the charges, directed as they are in the main against those immune from proscecution. This argument is plausible but its deficiency resides in the fact that it does not meet the situation. The inescapable point is that Plaintiff . . . in the absence of a responsive pleading is entitled as a right to make an attempt." (emphasis supplied).

Similarly, in Labatt v. Twomey, 513 F.2d 641 (CA 7, 1975), at pages 650-651, The Seventh Circuit Court held that a plaintiff should have been permitted to file an amended complaint as of right subsequent to a motion to dismiss or for summary judgment.

The Sixth Circuit echos well the wisdom of our Seventh Circuit. In Ohio Casualty Ins. Co. v. Farmers Bank of Blay, Ky., 178 F.2d 570, 573 (CA 6, 1949) the Court said:

> "Inasmuch as no responsive pleading had been filed at the

> time appellant tendered its first (tardy) amendment to the complaint, the asserted untimeliness of the amendment was no valid ground for rejecting it."

Then the majority is joined by the Fifth Circuit where, in Dowdy v. Procter & Gamble Manufacturing Company, 267 F.2d 827, 828 (CA 5, 1959), it said:

> "It is . . . true, under the settled law in this circuit, that if (the complaint) did not state . . . a claim, the district judge was in error in dismissing it without granting leave to amend."

However, if there be some reason, not apparent to petitioner, why an amendment to a complaint should not be automatically allowed when the complaint is confronted by a motion to dismiss, then recognition should, nevertheless, be given to the holdings of the Seventh Circuit and those from other circuits and from this Court which are liberal and just in freely conferring leave to amend when requested.

In Foman v. Davis, 371 U.S. 178 (1962), at page 182, this Court expressed the notion of fairness upon which the rule is based:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), §§ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

> not contained in a properly captioned motion paper (pursuant to FRCP 7(b)(1), we need not decide whether appellants' right to amend their complaint after the successful motion to dismiss survived the defective motion. See Nolen v. Fitzharris, 450 F.2d 958 (9th Cir. 1971); Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967); Breier v. Northern Cal. Bowling Proprietors' Ass'n, 316 F.2d 787, 789 (9th Cir. 1963); see generally 3 J. Moore, Federal Practice, Paragraph 15.10 at 959 (2d ed. 1974). Even where amendment is not a matter of right, leave to amend shall be freely given when justice so requires. We can conceive of facts that would render the alleged discrimination . . . (to be) state action and we can discern . . . no reason why leave to amend should be denied" (emphasis added).

Finally, petitioner urges scrutiny of Breier v. Northern California Bowling Proprietors' Ass'n, 316 F.2d 787 (CA 9, 1963) where the District Court, on Defendant's motion, dismissed Plaintiff's complaint for failure to state a claim upon which relief could be granted. Plaintiff's inquired whether the order was intended to

In Austin v. House of Vision, Inc., 385 F.2d 171 (CA 7, 1967), the Seventh Circuit stated:

> "When plaintiff seeks an opportunity to amend his complaint to meet objections raised by a motion to dismiss for failure to state a claim, he should be accorded such an opportunity, since it cannot be determined whether the amended complaint will state a claim unless and until the amended complaint is filed and tested."

Then remember, petitioner, on at least two occasions, timely raised the issue of amending the complaint. Appendices, pp. 67a-69a & 73a-75. If the 7th Circuit or the trial court did not look with favor on petitioner's asking for leave to amend in a brief, of all places, then petitioner urges a review of the case of Nolen v. Fitzharris, 450 F. 2d 959 (CA 9 1971), a civil rights case, where the District Court dismissed the complaint on the ground that it failed to state a claim

upon relief could be granted and denied leave to amend. The Ninth Circuit said:

> "Under Rule 15(a), F.R. Civ. Proc., a party may amend his pleading once as a matter of course at anytime before a responsive pleading is served. A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Citation omitted. Defendants had filed no answer or other pleading prior to entering of the order dismissing the action. In their memorandum briefs filed in the district Court, Plaintiffs indicated that they wished to file an amended complaint. It therefore appears that Plaintiffs had the right to amend the complaint as a matter of course, which right was denied to them by the above quoted order. On Plaintiff's appeal the order is reversed so that an amended complaint may be filed." (emphasis supplied).

And that of Scott v. Eversole Mortuary, 522 F.2d 1110, 1116(CA 9, 1975):

> "The last issue presented . . . is whether, upon remand, appellants should be allowed leave to amend. They expressly requested to do so (the Court's footnote to this sentence says: 'Although appellants' written request for leave to amend was

preclude amendment of the complaint. The District Court responded that it thought the complaints so inherently frail that they were not the subject of any amendment. Judgment was then entered denying leave to amend. The Court said, at page 789:

> ". . . a motion to dismiss is not a responsive pleading within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed (emphasis supplied)."

CONCLUSION

These radical departures by The Seventh Circuit from its own holdings and its sanctioning of such a departure by the trial court justify the grant of certorari or summary disposition directing the Court of Appeals to allow petitioner to amend his complaint.

Respectfully submitted

McGee Parramore

December 22, 1980

McGee Parramore

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APPENDICES

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1980

Before

HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

LESLIE H. ALLOTT, JR.,
Plaintiff-Appellant,

No. 79-2294

vs.

RAYMOND SICINSKI, et al.,
Defendants-Appellees.

Appeal from the United
States District Court
for the Northern District
of Illinois, Eastern Division.
No. 78 C 4712
Julius J. Hoffman, Judge.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1980

Before

HON. RICHARD D. CUDAHY, Circuit Judge

LESLIE H. ALLOTT, JR.,
Plaintiff-Appellant,

No. 79-2294

VS.

RAYMOND SICINSKI, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 78-C-4712
Judge Julius Hoffman

Upon consideration of the "MOTION TO ENLARGE TIME" filed herein on July 11, 1980 by counsel for plaintiff-appellant,

IT IS ORDERED that said motion is her-

eby GRANTED, and the time for filing plaintiff-appellant's petition for rehearing is hereby extended to and including August 29, 1980.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 1, 1980

Before
HON. WILLIAM J. BAUER, Curcuit Judge

LESLIE H. ALLOTT, JR.,
Plaintiff-Appellant,

No. 79-2294

VS.

RAYMOND SICINSKI, et al.,
Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.
No. 78-C-4712
Judge Julius Hoffman

On consideration of the "MOTION TO ENLARGE TIME" filed herein on July 7, 1980, by counsel for the plaintiff-appellant,

IT IS ORDERED THAT said motion is hereby GRANTED and the time for filing the

plaintiff-appellant's response to the defendants-appellees' "MOTION TO AFFIRM JUDGMENT WITHOUT ORAL ARGUMENT" filed in this court on July 3, 1980, is extended up to and including August 29, 1980.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Submitted: May 30, 1980

June 19, 1980

Before

HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

UNPUBLISHED ORDER NOT TO BE
CITED PER CIRCUIT RULE 55

LESLIE H. ALLOTT, JR.,
Plaintiff-Appellant,

No. 79-2294

VS.

RAYMOND SICINSKI, et al.,
Defendants-Appellees.

Appeal from the United
States District Court
for the Northern
District of Illinois,
Eastern Division.
No. 78-C-4712
Julius J. Hoffman, Judge.

O R D E R

Count 53 of plaintiff's civil rights complaint, filed on November 27, 1978, alleges that the Illinois Attorney Registration and Disciplinary Commission's

refusal to act on his grievances against six attorneys violated his rights to due process and equal protection.

The district court dismissed Count 53 and struck it from the complaint on January 19, 1979 because plaintiff had failed to state a claim against the Commission. The court dismissed the remainder of the action with prejudice on September 28, 1979. Judgment was entered accordingly on October 2, 1979. The Commission has moved for affirmance pursuant to Circuit Rule 15.

On October 23, 1979, 21 days after entry of judgment, plaintiff presented a motion to amend his complaint. The district court ruled that plaintiff's motion, coming after entry of a judgment of dismissal was not a motion to amend the complaint, but was rather a motion to vacate or alter a judgment. Since such a motion must be made within ten (10) days of the entry of the judgment, Fed. R. Civ. P. 59

(e), the court denied plaintiff's motion.

Once a judgment of dismissal or summary judgment has been entered, the judgment should be reopened or vacated before an amendment to the complaint is permitted. Chrysler Corp. v. Lakeshore Commercial Finance, 66 F.R.D. 607 (E.D. Wis. 1975). Therefore, the district court correctly treated plaintiff's motion to amend the complaint as necessarily a motion to alter or amend the judgment within Fed. R. Civ. P. 59(e). Once the court enters a judgment of dismissal, plaintiff's right to amend is a matter for the district court's discretion. Hurd v. DiMento, 440 F.2d 1322, 1323 (1st Cir.), cert. denied, 404 U.S. 862, reh. denied, 404 U.S. 961 (1971). Under Fed. R. Civ. P. 6(b), the district court has no discretion to extend the ten days within which a motion under Rule 59(e) may be made. Motteller v. J.A. Jones Construction Co., 447 F.2d 954, 955 (7th Cir.

1971). Accordingly, the district court's denial of plaintiff's motion was not an abuse of discretion. Indeed, Rule 6(b) mandated the denial of a motion made 21 days after the entry of the judgment.

Alternatively, the judgment of dismissal is affirmed as to defendant Commission because there is no federally-guaranteed right which requires a state bar association to address every grievance brought to its attention. Rather, the only right that is given to plaintiff or to any other person is that of complaining to the association. The Board or Committee has no duty to recommend disciplinary action in every case, and none to report its action in every inquiry to the Supreme Court. Tranowski v. Chgo. Bar Assoc., 309 F.2d 421 (7th Cir. 1962). While Tranowski antedates the 1973 Illinois provisions which substituted the Commission for the Bar Association's Board of Managers, there is no la-

nguage in the new rule which requires the Commission to take positive action in every case. 1/ As the Sixth Circuit said on similar circumstances,

> We find no authority, and none has been cited to us, to support appellant's conclusion that he has a right under the Federal Constitution to require the State Bar (of Michigan) to process this complaint. The regulation of the practice of law, including the procedure of disbarment and discipline of members of the profession, is a function of state government. Consequently, there has been no deprivation of right which would give rise to a cause of action under section 1983, Title 42, U.S.C.A.

Saier v. State, 293 F.2d 756, 759 (6th Cir.), cert. denied, 368 U.S. 947 (1961), emphasis added.

In view of the foregoing, defendant Commission's motion to affirm without oral argument is granted.

1/ See S.H.A. ch. 110A, § § 751 et seq.

Unpublished Per Curiam Order

JUDGEMENT - NO ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 19, 1980

Before

HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

LESLIE H. ALLOTT, JR,
Plaintiff-Appellant,

No. 79-2294

VS.

RAYMOND SICINSKI, et al.,
Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division

No 78-C-4712
Julius J. Hoffman, JUDGE

This cause came before the Court for decision on the record from the United States District Court for the Northern

District of Illinois, Eastern Division.

On consideration whereof, it is ordered and adjudged by this Court that the judgement of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LESLIE H. ALLOTT, JR.,
Plaintiff,

No. 78 C 4712

v.

RAYMOND SICINSKI, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. JULIUS HOFFMAN, one of the Senior Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 23, 1979, at the hour of 10:00 o'clock a.m.

APPEARANCES:

MR. MC GEE PARRAMORE,
appeared on behalf of the Plaintiff;

MR. JAMES R. SHIROTT,
MR. CLIFFORD A. HARTSTAD,
MR. WILLIAM W. KURNIK,
MR. NICHOLAS E. SAKELLARIOU,
MR. GEORGE SPELLMIRE,
appeared on behalf of the Defendants.

THE CLERK: In re Leslie H. Allott, Jr., v. Raymond Sicinski, et al., motion styled motion for leave to amend plaintiff's complaint . . .

* * *

THE COURT: Mr. Parramore.

* * *

MR. PARRAMORE: . . . This Court dismissed the complaint as to all defendants on September 28, 1979; and I filed a motion in which I asked for leave to amend the complaint for the reason that we have additional facts which if (pled) will sustain a cause of action and since none of the defendants -- since there has been no discovery, since there has been no responsive pleading by any of the defendants, and since Rule 15(a) gives any

party the right to amend once without leave of Court, this plaintiff asks for leave to amned even though we feel that we don't have to ask for it. Nevertheless, we have done so.

THE COURT: Any counsel for any defendant wish to be heard?

MR. SHIROTT: Your Honor, Jim Shirott.

Normally, I wouldn't object to the filing of a first amended complaint, but this complaint was so lengthy and it covered every factual parameter that could possibly exist. I think the Court gave the plaintiff every opportunity and treated the complaint almost with the standard of Hanes v. Kerner in giving the plaintiff a fair chance. It's not like we're dealing with a three-count complaint, and the case was dismissed on a mere technicality, your Honor.

THE COURT: Well, we gave it careful consideration.

MR. SHIROTT: That's all that I care to say, your Honor. I think you have given not only the facts of the complaint, but every factual situation that could possibly be inferred from the facts as pled, fair consideration. It's on that basis that we object to the filing of an amended complaint, your Honor.

THE COURT: Any other lawyer wish to be heard?

MR. HARTSTAD: Yes, your Honor. I'd like to join Mr. Shirott's comments. I'd also like to add, additionally, my client is one of the attorneys who is sued for breach of contract and malpractice in this action. I think the jurisdictional grounds that your Honor relied on in dismissing my client and those in a similar situation was very clear and there cannot be any fact that I can think would be appropriate to bring them back into this case.

THE COURT: Anyone else?

MR. KURNIK: Your Honor, I would just make one observation. I believe the law, contrary to what Mr. Parramore asserts, is that it's discretionary with this Court as to whether or not leave should be granted to file an amended complaint. The rule which he cites deals with an amended complaint before any judgement has been entered. Your HOnor has entered a judgment dismissing the complaint with prejudice. That is the only observation I would make, your Honor.

MR. SPELLMIRE: If I may, your Honor, my name is George Spellmire, on behalf of the defendant Harry McSteen, also one of the attorney defendants before this Court on the plaintiff's complaint purely on state grounds, and like my -- other counsel here, I do not believe that there are -- that there is any reason for allowing an

amended complaint with respect to my clent.

MR. SAKELLARIOU: The City of Joliet defendants would just join in Mr. Shirott's comments.

THE COURT: Do you wish to reply, sir?

MR. PARRAMORE: Yes, sir. In response to the statement made by Mr. Kurnik, I would cite Austin v. The HOuse of Vision, Inc., by the Seventh Circuit, 385 F. 2d 171, in which the Seventh Circuit took the position that when plaintiff seeks an opportunity to amend his complaint to meet objections raised by a motion to dismiss for failure to state a claim, he should be accorded such an opportunity, since it cannot be determined whether the amended complaint will state a claim unless and until the amended complaint is filed and tested. Secondly, in response to Mr. Kurnik's observation that the complaint was dismissed with prejudice and,

therefore, this constitutes a bar to the plaintiff to file an amended complaint, I refer to the case of Coats v. Illinois State Board of Education. 559 F. 2d 445, 1977, by the Seventh Circuit in which -- which was a segregation case. And I might add that in that case Mr. Sakellariou and Mr. Shirott were attorneys for some of the defendants, and Judge Grady dismissed the case with prejudice, which was upheld by the Seventh Circuit Judge Cummings; but the Court states on Page 451 in Footnote 12:

> "In oral argument, plaintiff's counsel explained that leave to amend was not sought because she mistakenly thought the very fact of dismissal, dismissal with prejudice, prevented her from seeking leave to amend."

And with respect to Mr. Hartstad's and Mr. Spellmire's comment about pendent party jurisdiction not being applicable, let me state that, first of all, I disagree with the Court and it's ruling; but be that

as it may, we, in filing our amended complaint, do not, at least at this time, intend to rely upon facts to justify pendent party jurisdiction. There are other facts. And in response to comments made by several of the attorneys as to the plethora of facts, all of which were pleaded and their inability to comprehend how there could be other facts, well, this is peculiarly within the possession and knowledge of the plaintiff and mine. If I had pled all of the facts in this extremely complicated web of activity, the complaint would have been 183 pages long rather than 83 . . .

* * *

THE COURT: We have here, as has been stated by the Clerk, a motion styled Motion for Leave to Amend Plaintiff's Complaint .

. . This was an action in which, as counsel for the plaintiff has pointed out, the plaintiff filed a complaint consisting of 83 pages containing 53 counts against 55 defendants. Counts I through XL and Count LIII set out that the claims thereunder arose under 42 USC Section 1983. Counts XLI through LII contain allegations of breaches of contract and legal malpractice against separate defendants.

In response to the plaintiff's complaint, all but four of the defendants filed motions to dismiss the complaint stating various grounds as a basis for the relief. The Court allowed certain of the motions and took the remainder under advisement. On September 28, 1979, the Court allowed the pending motions to dismiss and dismissed the complaint in its entirety with prejudice as to all defendants after an exceedingly careful

consideration of the issues presented by the memoranda of the parties.

By the motion now before the Court, the plaintiff seeks "leave to amend the complaint" . . . In support of its motion, the plaintiff states that he has additional facts, information, and belief which were not pleaded in the original complaint. In light of the fact that none of the defendants has filed an answer and no discovery has been taken, the plaintiff contends that no prejudice would be suffered by the defendants. The plaintiff also states that because a motion to dismiss is not a responsive pleading for the purposes of Rule 15(a)of the Federal Rules of Civil Procedure he may amend his complaint without leave of Court.

* * *

While the Court does not disagree with

the plaintiff's contention that a motion to dismiss is not considered to be a responsive pleading in this Circuit within the meaning of Rule 15(a) of the Federal Rules of Civil Procedure, the Court finds this point irrelevant in view of the circumstances of the case at bar. This case was dismissed by order of the Court on September 28, 1979, with prejudice; and judgment of dismissal was entered on that same date. Once judgment of dismissal was entered, the right to amend is not automatic, but rather is within the sound discretion of the Court. Hurd v. Dimento & Sullivan, 440 F. 2d 1322, First Circuit, 1971. In determining whether leave to amend should be granted, the Court generally must review the allegations of the amended complaint to ascertain whether the deficiencies of the challenged pleading has been cured. Asher v.

Harrington, 461 F. 2d 890, Seventh Circuit, 1972. Because the plaintiff has failed to submit the proposed amended complaint, the Court is prevented from making such an examination.

The circumstances presented by the plaintiff's motion, however, are not ordinary in the sense of his right to seek leave to file an amended complaint. Although the motion is cloaked in this language, it is, from a procedural standpoint of necessity, a motion to alter or amend judgment in light of the fact that the Court's judgment of dismissal entered September 28, 1979, was with prejudice and therefore a final judgment. Flett v. W.A. Alexander & Company, 302 F. 2d 321, Seventh Circuit, 1962.

Such a motion is controlled by Rule 59(e) of the Federal Rules of Civil Procedure which requires that the motion be

served not later than 10 days after the entry of judgment. Under Rule 6(b) of the Federal Rules of Civil Procedure, the District Court is without the power to extend the time set forth in Rule 59(e) within which a motion to amend a judgment must be brought. Moteller v. Jones Construction Company, 447 F. 2d 954, Seventh Circuit, 1971. Accordingly, because the present motion has been submitted in excess of 10 days after the entry of judgment, it is untimely and it will be denied.

The motion of the plaintiff styled, Miss Clerk, "Motion for leave to amend plaintiff's complaint . . ." is denied.

* * *

WHICH were all the proceedings had and taken in the above-entitled cause on

the day and date aforesaid.

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

UNITED STATES DISTRICT COURT

For The

NORTHERN DISTRICT OF ILLINOIS

CIVIL ACTION FILE NO.
78 C 4712
JUDGMENT

LESLIE H. ALLOTT vs. SICINSKI, et al.

This action came on for trial (hearing) before the Court, Honorable JULIUS J. HOFFMAN, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision been duly rendered,

It is ordered and Adjudged

Judgment is entered in favor of the defendants and Against the Plaintiff.

Dated at Chicago, Illinois this 28th day of September, 1979.

H. Stuart Cunningham,
Clerk of Court

By: Gale L. Vaneteo
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Julius J. Hoffman

Cause No. 78 C 4712

Date September 28, 1979

Title of Cause Leslie H. Allott, Jr.

vs.

Raymond Sicinski, et al.,

Brief Statement of motion Ruling

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent _____

Reserve space below for notations by minute clerk

Motions to dimiss the complaint filed to date by several of the defendants are granted. Portions of the respective motion requesting attorney's fees is denied without prejudice. IT IS ORDERED that the plaintiff's complaint is dismissed in its entirety as to all defendants, with prejudice, and costs.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LESLIE H. ALLOTT, JR.,
Plaintiff,

vs.

RAYMOND SICINSKI, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. JULIUS J. HOFFMAN, Senior Judge of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, September 28, 1979, at the hour of 10:00 o'clock a.m.

APPEARANCES:

MR. MC GEE PARRAMORE,
appeared on behalf
of the Plaintiff;

MR. CLIFFORD HARSTAD,
appeared on behalf
of defendant Craig
Greenwood;

MR. CHARLES W. HAHN,
appeared on behalf
of defendant Edward
Brown;

MR. ROBERT LORZ,
appeared on behalf
of the City of Joliet,
et al.;

MR. WILLIAM KURNIK,
appeared on behalf
of certain Will County
defendants;

MR. RICHARD BROM,
appeared on behalf
of Will County and
the Will County Board;

MR. GEORGE FELDMAN,
appeared on behalf
of befendant Harry
McSteen.

THE CLERK: 78 C 4712, in re: Leslie Allott, Jr., vs. Raymond Sicinski, et al., for ruling. Motions of various defendants to dismiss the plaintiff's complaint.

* * *

THE COURT: We have for ruling the motions of various defendants to dismiss the plaintiff's complaint. The plaintiff in this action, Leslie Allott, Jr., has filed a complaint consisting of 83 pages, containing 53 counts, against 55 defendants. Counts 1 through 40 and Count 53 arise under 42 U.S.C. Section 1983. Counts 41 through 52 contain allegations of breach of contract and legal malpractice against separate defendants. In response to the plaintiff's complaint, all but four of the defendants filed motions to dismiss the complaint stating various grounds as a basis for their relief. The Court allowed

the respective motions to dismiss of the defendants Peter Tatooles and the Attorney Registration and Disciplinary Commission, and concommitantly struck Counts 45 and 53 from the plaintiff's complaint. The Court has taken the motions to dismiss of all other defendants under advisement, pursuant to the provisions of the local Rule 13. All motions are now fully briefed and before the Court for ruling this morning.

In Counts 1 through 40 of the plaintiff's complaint, he alleges that various defendants were employed by him for the purposes of conducting an investigation of his wife's activities, presumably to uncover evidence for use in the plaintiff's alleged divorce action then pending. Plaintiff alleges that such defendants failed to perform their duties for him as agreed, and that what duties

they did perform were in contravention of the rules and regulations of their various employers -- the Sheriff's Department of Will County and the Police Department of the City of Joliet. The plaintiff alleges that the superiors of certain defendants failed to prevent them from engaging in such employment and that other defendants, including certain members of the County Board of Will County, city councilmen for the City of Joliet, and the Mayor of the City of Joliet, failed to investigate the activities of certain defendants at the request of the plaintiff and failed recommend or take disciplinary action against those defendants who were allegedly engaged in inventigative work for the plaintiff. The various acts and omissions set forth in Counts 1 through 40 allegedly consistute violations of 42 U.S.C. Section 1983.

As the Court has observed, all but four of the numerous defendants in this case have filed motions to dismiss. The thrust of the motions filed by the defendants in Counts 1 through 40 is that the plaintiff has failed to state a claim upon which relief can be granted. In determining whether to grant a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, the allegations of the complaint are construed in the light most favorable to the pleader, Scheuer v. Rhodes, 416 United States 232 (1974); Illinois Migrant Council v. Campbell Soup Company, 519 Federal Second 391 (Seventh Circuit, 1975) with every doubt resolved in his behalf, Burns v. Paddock, 503 Federal Second 18 (Seventh Circuit, 1974). Therefore, unless it is clear that the plaintiff can prove no set of facts which would entitle

him to relief on his claim, the motion to dismiss must be denied. United States v. Interlake Incorporated, 429 Federal Supplement, 193 (Northern District of Illinois, 1977).

Even in applying such rigid standards to the allegations found in Counts 1 through 40 of the plaintiff's complaint, the Court is unable to conclude that any of the 40 Counts states a cause of action against the respective defendants therein.

Counts 1 through 3 of the complaint are brought against the defendant Raymond Sicinski, Carl Sicinski, and Dan Cromp, respectively.

* * *

THE COURT: Raymond Sicinski was allegedly a member of the Police Department of the City of Joliet, while the defendants

Carl Sicinski and Dan Cromp were allegedly employed as Deputy Sheriffs for Will County, Illinois. It is charged that the defendants were employed by the plaintiffs to conduct, what is described in the complaint as "surveillance of plaintiff's wife relative to plaintiff's counterclaim in a suit for divorce." Such work was performed, so it is asserted, in an improper manner by each of the defendants in various respects alleged in the three Counts and in violation of the Police Department of the City of Joliet and the Sheriff's Department of the County of Will, which, it is averred, prohibit Police Officers and Deputy Sheriffs from performing private domestic surveillance work. The alleged acts and omissions of the respective defendants caused the plaintiff "to suffer severe emotional distress, resulted in extreme business

losses, and expenditures of such further sums of money as needed in the prosecution of the plaintiff's counter-suits for divorce." The plaintiff seeks the sum of $480,000 in compensatory damages and $1,450,000 in punitive damages from each respective defendant.

Each defendant contends that the complaint is deficient in two respects: one, that it is devoid of any factual allegation from which it could be concluded that the conduct of each defendant was performed under color of state law; and two, that it is devoid of any factual allegation from which it could be concluded that the conduct of each defendant deprived the plaintiff of a Constitutional right. The Court agrees. There are no facts set forth in the first three Counts of the complaint which, if true, would establish that any of the defendants performed private surveillance work for the

plaintiff while under color of state law, within the meaning of 42 U.S.C. Section 1983. This is the fundamental element of the plaintiff's cause of action under this statute. Although the plaintiff avers that the acts of the respective defendants were performed under the color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, and that each defendant was either a Police Officer of the City of Joliet or a Deputy Sheriff of the County of Will, neither allegation, either aloneor in combination with others, is sufficient. The mere aversions that a defendant is a state officer does not require the conclusion that the defendant was acting under color of state law at the time relevant to the complaint. Askew v. Bloekmer, 548 Federal Second 673, (Seventh Circuit, 1976). The complaint must allege facts which support its conclusion that the

actions of the defendants were committed under color of state law. Hahn v. Sargent, 388 Federal Supplement 445, 450 (District of Massachusetts, 1975), affirmed, 523 Federal Second 461. In light of the allegations that the defendants performed the acts complained of while under the employ of the plaintiff himself, and in absence of any allegations that such acts were performed by each defendant under the cloak of his position as a city officer or county deputy, the requisite state action is not sufficiently alleged.

Additionally, the Court observes that it is aware of no individual rights arising to a Constitutional magnitude which can be gleaned from the allegations of Counts 1 through 3. The asserted failure of the defendants to perform private surveillance work for the plaintiff to the best of their abilities by committing the acts, or any of

them, enumerated in the complaint, reveals the violation of no cognizable Constitutional right. Nor does the fact that such employment was prohibited by the regulations of the Police Department of the City of Joliet and the Sheriff's Department of the County of Will suffice to state a claim under 1983. The mere violation of departmental regulations in and of itself does not give rise to a violation of an individual's Civil Rights, Robinson v. Leahy, 401 Federal Supplement 1027, 1030 (Northern District of Illinois, 1975) Saunders v. Cahill, 350 Federal Supplement 73, 83 (Northern District of Illinois, 1975), nor are there any additional facts alleged in the complaint from which the Court is able to conclude that the alleged violation of the regulations in question operated in the circumstances set forth to deprive the plaintiff of any rights protected under either the United States

Constitution or the Civil Rights Act of 1871. Accordingly, the motions of the defendants in Counts 1 through 3 respectively will be allowed.

Counts 4 and 5 are brought against the defendant, Fred Breen, as the alleged Chief of Police of the City of Joliet and the defendant, Joseph Trizna, as the alleged Sheriff of the County of Will. In Count 4 the defendant avers that the defendant Breen had a duty to prohibit the defendant Raymond Sicinski from violating the rules of the Joliet Police Department, that the defendant Breen failed to take steps to prohibit such violations, that he "finally took disciplinary action against defendant Raymond Sicinski only after prodding of the plaintiff." The complaint also charges that defendant breached his duty to "turn the case over to the proper authorities for criminal action against the defendant Raymond Sicinski for the act of perjury."

In Court 5 it is alleged that the defendant Trizna failed to take steps to prohibit the defendants Carl Sicinski and Dan Cromp from violating the rules of the Sheriff's Department of Will County and failed to take disciplinary action against either Sicinski or Cromp. Each Count contains allegations that the respective defendants had knowledge of the police officer's and deputies' actions. The plaintiff seeks damages in the amount of $480,000 and punitive damages in the amount of $1,450,000 against each defendant.

Counts 9 and 10 of the complaint charge the County of Will and City of Joliet with failing to enforce the subject regulations of their respective law enforcement agencies and officers. The plaintiff seeks compensatory damages against each defendant in the sum of $485,000 and punitive damages in the sum of

$1,455,000.

Insofar as the plaintiff attempts to state a claim for relief based upon the failure of those particular defendants to enforce the departmental regultions in question, or to ascertain, in the first instance, the alleged violations of such regulations, the plaintiff has shown no right to recovery. The Court has already determined allegations against the defendant Police Officer and the defendants Sheriff's Deputies, even if taken as true, do not reveal a violation of Constitutionally protected rights. This is not, therefore, a case where the failure of a superior to control the actions of his subordinate operates to create a personal liability under Section 1983. Moon v. Winfield, 368 Federal Supplement 844 (Northern District of Illinois, 1973). Nor is the Court able to conclude from the allegations that the plaintiff has any

right, Constitutional or otherwise, to strict enforcement of the particular departmental regulation in question.

It is also clear that the liability of the defendants Breen, Trizna, and the City of Joliet and the County of Will, or indeed that of any of the defendants, cannot be predicated on the doctrine of respondeat superior. Monell v. Department of Social Services of the City of New York, ____ U.S. ____, 436 Supreme Court 658 (1978). Additionally, the Court notes an absence of any factual allegations pointing to a policy or even an informal custom of either Breen or Trizna in their capacity as supervisory personnel, of either the City or the County, or of any of the defendants in the remaining Counts of the complaint, which when executed in relation to the enforcement of the subject regulation, would inflict injury of a Constitutional

character. Monell v. Department of Social Services of the City of New York, to which I have just alluded.

In Count 2 it is alleged that the defendants Richard, Walsh, and Weidling, members of the County Board of Will County, obstructed justice by failing to investigate possible criminal acts of policemen, deputy sheriffs, and local Will County attorneys, and by failing to "insist that such charges be thoroughly investigated by Steven Luzbetak, Chairman of the Sheriff's Committee," upon the request of the plaintiff. In Count 7, it is charged that the defendant, Steven Luzbetak, Chairman of the Sheriff's Committee of the County Board of Will County, obstructed justice by failing to investigate the plaintiff's charges, evidence of which was given to him by the defendants named in Count 6, and by failing

to present such charges to the defendant Trizna, the Sheriff of Will County. In Count 8, the plaintiff alleges that such evidence was given to the defendant Trizna, but that Trizna obstructed justice by failing to investigate the plaintiff's charges and by failing to present such charges to the proper authorities for prosecution.

Such acts and omissions of these particular defendants allegedly deprived the plaintiff of his Constitutional rights to due process and equal protection, so it is asserted, for which the plaintiff seeks compensatory damages of $200,000 and punitive damages of $600,000 against the defendants in Counts 6 to and including Count 8.

Counts 11 to and including 32 are brought against the individual board members of the County Board of Will County.

With the exception of the named defendant, each of the several Counts contains the same allegations. The plaintiff avers that he complained to each of the defendants about the acts and omissions of the defendants Carl Sicinski, Dan Cromp, Joseph Trizna and Steven Luzbetak "with a view toward taking disciplinary action against the foregoing defendants and/or recommending to the proper authorities that criminal charges be brought against them." Each of the defendants, however, "failed and refused to conduct such an investigation and/or to make such a recommendation." It is alleged that the conduct of the respective defendants "constituted a neglect of duty and an obstruction of justice," depriving the plaintiff of his rights to due process and equal protection under the law. The plaintiff seeks compensatory damages in the amount of $20,000 and punitive damages

in the amount of $500,000, against each of the defendants in Counts 11 to and including Count 32.

Counts 33 to and including Count 40 are brought against the individual city councilmen for the City of Joliet and the Mayor of the City of Joliet. With respect to each defendant, the allegations here are the same as those in Counts 11 through 32, except that here, the plaintiff's complaints to the city councilmen and the Mayor were confined to the acts and omissions of the defendants Raymond Sicinski and Fred Breen.

In none of the Counts heretofore mentioned by the Court, is it possible to discern a cause of action of Constitutional proportions. Certain of the defendants contend that the law imposes upon them no duty to take or recommend the type of action that the plaintiff allegedly

sought. While the Court is inclined to agree with this contention, it is a point which need not be reached in light of the absence of rudimentary allegations demonstrating the plaintiff's right to relief under 42 U.S.C. Section 1983.

The Court has previously observed that the complaint does not rest of sufficient allegations to raise a Constitutional question related to a policy or informal custom of any of the defendants, which governs the enforcement of departmental regulations. The same observation applies with equal force to the lack of factual allegations pointing to a policy or custom of the several defendants individually, as an administrative body, or otherwise, which, when executed in the processing of the plaintiff's complaints, operated to deprive him of a Constitutional right. Monel v. Department of Social

Services of the City of New York, to which I have previously referred.

When stripped of its conclusory allegations, the complaint is left with no factual foundation except that the several defendants "failed and refused" to conduct an investigation of the plaintiff's charges, or, at the plaintiff's instance, "failed and refused" to refer such charges to the "proper authorities," and failed to recommend to such authorities that criminal prosecution be instituted against certain of the defendants. From these allegations the plaintiff asserts that he denied his rights to due process and equal protection under the law. Without certain intervening factual allegations to indicate how and in what manner the action or inaction of the defendants operated to deprive the plaintiff of due process or equal protection, the complaint is fatally

defective.

The mere refusal to investigate charges or to recommend criminal prosecution, does not, without more, state a claim for relief under 42 U.S.C. Section 1983. Modla v. Chrysler Corporation, 448 Federal Supplement 769 (Sixth Circuit, 1970) Plampin v. United States Fidelity & Guaranty Company, 463 Federal Supplement 972 (District of South Carolina (1978). Nor will such allegations coupled with the plaintiff's abstract assertion that one or another Constitutional right has been violated establish his claim to relief. Shakman v. Democratic Organization of Cook County, 435 Federal Second 267 (Seventh Circuit, 1970). The plaintiffs must plead facts which reveal some relationship between the acts of the defendants, which are not of themselves unconstitutional, and the deprivation of the plaintiff's rights. Williams v. Patton, 410 Federal

Supplement 1 (Eastern District of Pennsylvania, 1976) Saunders v. Cahill, 359 Federal Supplement 85 (Northern District of Illinois, 1973). The complaint before the Court is devoid of such facts. There are no allegations from which it may be concluded that the action or inaction of the several defendants resulted in depriving the plaintiff of a protected liberty or property interest or in subjecting the plaintiff to unequal protection of the law.

Accordingly, the motions of the defendants named in Counts 1 to and including Count 40 of the plaintiff's complaint, to dismiss the complaint for failure to state a claim upon which relief can be granted will be allowed. The Court notes that the defendant Sinclair named in Count 32 has not responded to the complaint. It appears, however, that this

defendant was never personally served with process and is not within the personal jurisdiction of the court. The Court will nevertheless dismiss the plaintiff's complaint as to all defendants named in the first 40 Counts, including the defendant Sinclair. Williams v. Patton, to which I have previously alluded.

The remaining Counts of the plaintiff's complaint are based upon alleged claims for breach of contract and legal malpractice, against a defendant detective agency, certain private investigators, and attorneys, who allegedly represented the plaintiff, or his wife, in various state court proceedings. All claims arise under the law of Illinois and are brought under the doctrine of pendent jurisdiction. Although pursuant to the Court's ruling roday, there are no longer any Constitutional claims as to which the

state-law claims are pendent, the Court observes that even if all of plaintiff's Constitutional claims had remained, this would still be an improper case in which to exercise pendent jurisdiction.

There is nothing on the face of the complaint from which the Court is able to infer a relationship between the averments contained in any of the Counts now under consideration and those in the Counts previously considered by the Count. Assuming, however, that the claims found in the remaining Counts do arise from a nucleus of operative facts common to those alleged in the first 40 Counts, the Court would be compelled to decline jurisdiction, nevertheless.

The Seventh Circuit has held that the doctrine of pendent jurisdiction cannot be invoked for the purpose of hearing a cause of action arising under state law against a

party by joining that cause of action in the same complaint with actions against different defendants arising under the Federal Civil Rights Act. Wojtas v. Village of Niles, 334 Federal Second 797 (Seventh Circuit, 1964). The Court finds the same situation presented in the instant complaint, and notes that no independant basis of federal jurisdiction is asserted by the plaintiff. Indeed, the plaintiff alleges on one page of the complaint that "the defendants are all citizens of the State of Illinois," and that the plaintiff is also a citizen of the State of Illinois. Thus the complaint itself forecloses the Court's exercise of diversity jurisdiction, which, under the circumstances of each allegedly pendent claim, is the only alternative jurisdictional basis upon which any of the remaining Counts could rest.

The issue of whether a non-federal claim could be the basis for joining a party over whom no independent federal jurisdiction exists, "simply because that claim could be derived from the 'common nucleus of operative fact' giving rise to the dispute between the parties to the federal claim," has been resolved by the United States Supreme Court in Aldinger v. Howard, 427 United States 1 (1976). I quote:

> From a purely factual point of view, it is one thing to authorize two parties, already present in Federal Court by virtue of a case over which the Court has jurisdiction, to litigate, in addition to their federal claim, a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and

> his claim against the second defendant derive from a common nucleus of operative facts. The addition of a completely new party would run counter to the well-established principal that Federal Court, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction mared out by Congress. Aldinger v. Howard, 427 United States at 14-15.

Such observations would be dispositive of the same issue which would be presented by the instant complaint, if the Court had found a federal claim to exist. This is simply not a situation which calls for the exercise of pendent jurisdiction under any circumstances. Accordingly, the motions brought by the defendants named in Counts 43 to and including Count 52 to dismiss the complaint for lack of subject matter jurisdiction are allowed. The Court again notes that certain of the defendants named in Counts 43 to 52 have not been personally served with process. The Court will nevertheless dismiss the plaintiff's

complaints as to all defendants named in these Counts, including those who have not responded. Basso v. Utah Power & Light Company, 495 Federal Second 906 (Ninth Circuit, 1974).

Miss Clerk, the motions to dismiss of the several defendants in this case are allowed . . .

It is ordered that the plaintiff's complaint is dismissed in its entirety as to all defendants, with prejudice and costs to the defendants pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

* * *

Which were all the proceedings had and taken in the above-entitled cause on the day and date presented.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LESLIE H. ALLOTT, JR.,
Plaintiff

NO. 78 C 4712

vs.

RAYMOND SICINSKI, et. al.,
Defendants

MOTION FOR LEAVE TO AMEND
PLAINTIFF'S COMPLAINT

* * *

This Court dismissed the Plaintiff's complaint on September 28, 1979. The Plaintiff has additional facts, information and belief which were not pleaded in the original Complaint. None of the Defendants has filed an answer; only motions to dismiss. And no discovery has been had by any party. Therefore, none of the Defendants would be damaged or prejudiced by this Court's allowing Plaintiff to amend the complaint, and the complaint may be amended "...when justice so requires." (FRCP15(a)).

The Plaintiff believes that it may amend its complaint under these circumstances* without leave of court, but elects to request leave out of respect for the Court and in the interest of conservation of the time of all parties and the Court.

* * *

Date:
October 11, 1979

McGee Parramore
505 W. Algonquin Road
Arlington Heights, IL
60005
(312) 593-2920

* A claim of any type - complaint, counterclaim, third-party complaint, or cross-claim - may be amended once without permission at any time before a responsive pleading is served. A defensive motion of any kind (e.g., to dismiss)...is not considered by the Seventh Circuit to be a "responsive pleading" for this purpose. Thomas v. Pate, 493 F.2d 151, 162 (7th Cir.

1974). Accordingly, during the pendency of such a motion or even after its disposition (unless the order makes specific provision concerning amendment) the plaintiff may amend without leave.

NOTICE OF MOTION

To: Attorneys Listed on Attached Sheet

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room 1700-B, United States Court House, 219 South Dearborn Street, City of Chicago, on October 23, 1979 at 10 o'clock a.m. or as soon thereafter as counsel can be heard.

SIGNED:_____

McGee Parramore
Attorney for Defendant
505 W. Algonquin Road
Arlington Heights, IL
60005
(312) 593-2920

PROOF OF SERVICE

I, McGee Parramore, attorney for Plaintiff, certify that I placed a true and correct copy of the Motion and Notice of Motion, to which this Proof of Service is attached, in the U.S. Mail at Arlington Heights, Illinois, on October 11, 1979 with

proper postage prepaid addressed to all attorneys of record as shown on the list attached to the Notice of Motion.

DATE: October 11, 1979

McGee Parramore
Attorney for Plaintiff
505 W. Algonquin Road
Arlington Heights, IL 60005
(312) 593-2920

UNITED STATES DISCTICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LESLIE H. ALLOTT, JR.,
Plaintiff

CASE NO. 78 C 4712

vs.

RAYMOND SICINSKI, ET AL.,
Defendants

Plaintiff's Answering Brief To
Memorandum Of Edwin M. Brown

Defendant Edwin Brown states in his brief that:

> "...there is nothing on the face of Plaintiff's complaint...from which there can be inferred a relationship among the averments contained in Count 51 with those contained in the other Counts of the Plaintiff's Complaint..."

The United States Supreme Court said in Hagans vs. Levine, 415 U.S. 546 (1974), that the GIBBS decision (383 U.S. 715 (1966) should be read to encourage rather than to discourage use of pendent jurisdiction:

> ". .it is evident from GIBBS that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated.

> On the contrary, given advantage of economy and convenience and no unfairness to litigants, GIBBS contemplates adjudication of these claims."

Moreover, the 7th Circuit Court of Appeals has indicated that the failure of a trial court to consider a pendent state claim may constitute an abuse of discretion. Kimbrough v. O'Neil, 523 F2d 1057 (CA 7, 1975).

The common nucleus of operative fact exists because of a conspiracy between Defendant Brown and other attorneys practicing in Will County and certain public, governmental officials in Will County and Joilet, Illinois. The United States Supreme Court has held that private citizens who act in concert with state officials to deny an individual the equal protection of the law ...are individually liable under 42 U.S.C. Section 1983. ADICKES v. S. H. KRESS & CO., 398 U.S. 144. <u>While Plaintiff has not specifically plead this conspiracy and while a Plaintiff recognizes that a greater degree</u>

of specificity is required in Civil Rights Cases than that normally required under Notice Pleading, Plaintiff avers that the conspiracy is inferable from the pleadings. Nonetheless, if this Court disagrees with Plaintiff's conclusion, Plaintiff requests leave of the court to replead his complaint for the purpose of more specifically alleging this conspiracy (emphasis supplied).

Dated this 18th day
of January, 1979

McGee Parramore
Attorney at Law
601 South Stuart Lane
Palatine, IL 60067
(312) 358-3631

LESLIE H. ALLOTT, JR.,
Plaintiff-Appellant,

vs.

RAYMOND SICINSKI, et al.,
Defendants-Appellees.

No. 79-2294

AFFIDAVIT OF APPELLANT'S COUNSEL

McGee Parramore, after being duly sworn, deposes and states as follows:

1. I am the attorney for plaintiff-appellant in the captioned case and orally ordered an expedited transcript of the proceedings held in the captioned case in the courtroom of the Honorable Julius J. Hoffman on September 28, 1979 from the court reporter who was present on that day, Ms. Maellen F. Pittman, C.S.R. I ordered this transcript on September 28, 1979 before the commencement of the proceedings.

2. I received a copy of this transcript in

the mail on October 9, 1979.

3. When Judge Hoffman rendered his opinion on September 28, 1979, he read it into the record from what appeared to be a typewritten manuscript. He did not offer any of the attorneys present a copy of his opinion nor did I, or any of the other attorneys while in my presence, ask him for a copy.

4. In my first appearance before Judge Hoffman in this case on December 20, 1978, he read his preliminary reaction to the case into the record from what also appeared to be a typewritten manuscript.

5. I received a telephone call on September 27, 1979 from one of Judge Hoffman's law clerks who advised that on the following day Judge Hoffman would rule on all pending motions in the captioned case.

McGee Parramore

Date: January 21, 1980

Sworn to and subscribed before me, a notary public in and for Cook County, Illinois on January 21, 1980.

(Lorraine Rosenberg)

The above document is an AFFIDAVIT submitted on August 29, 1980 with PETITIONER'S BRIEF to the Seventh Circuit.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LESLIE H. ALLOTT, JR.,
Plaintiff

CASE NO. 78 C 4712

vs.

RAYMOND SICINSKI, ET AL.,
Defendants

Plaintiff's Answering Brief to Memorandum of Harry McSteen

Plaintiff asserts as his answer to points I and II of Defendant McSTEEN'S memorandum of law, the same points which were made in Plaintiff's answering brief (filed January 18, 1979) to the brief of EDWIN M. BROWN and plaintiff's answering brief (filed February 2, 1979) to JOSEPH P. COSTELLO, copies of both being furnished herewith to counsel for HARRY McSTEEN.

Plaintiff further adds:

That there was a conspiracy between defendant HARRY McSTEEN and defendants CARL and RAYMOND SICINSKI and DAN CROMP to defeat plaintiff's federally

protected right to a fair trial in a civil case by denying the plaintiff the right to testimony of defendants CARL and RAYMOND SICINSKI and DAN CROMP which would have shown adultery on the part of plaintiff's ex-wife.

This conspiracy would bring the action within § 1983 without the necessity of invoking pendent jurisdiction. While plaintiff states the conspiracy to be inferable from the face of the pleadings, if the Court disagrees, then plaintiff moves for leave of this Court to replead or plead over action pursuant to FRP C 15 (a) to meet whatever pleading specifity standards are required by federal law as to this conspiracy or to any other pleading defect the Court describes (emphasis supplied).

As to part III of defendant McSTEEN'S brief, plaintiff answers as follows:

1. Defendant McSTEEN'S conduct was wilful and wanton and the mental suffering inflicted is, therefore, compensable both by compensatory and punitive damages. Plaintiff requests leave of the Court, therefore, to plead over pursuant to FRP C 15 (a) (emphasis supplied).

2. A. Subparagraph 1, page 62, of the complaint alleges defendant McSTEEN was hired as attorney for plaintiff. Under the liberal federal notice pleading rules further detailed allegations are not necessary.

* * *

Dated:
February 12, 1979

McGee Parramore
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No. 80-1059

In the Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE H. ALLOTT, JR.,

Petitioner,

vs.

RAYMOND SICINSKI, et al.,

Respondents.

BRIEF OPPOSING PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1059

LESLIE H. ALLOTT, JR.,

Petitioner,

vs.

RAYMOND SICINSKI, et al.,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

Petition Number 80-1059 arises from the order of the United States Court of Appeals for the Seventh Circuit in *Allott* v. *Sicinski,* 78-C-4712, entered June 19, 1980. (*Petition,* Appendix at 7a.) Petitioner's motion for rehearing was denied on September 23, 1980. (*Petition,* Appendix at 1a.) Respondent-Attorney Registration and Disciplinary Commission submits the following in opposition to the *Petition.*

I.

REASONS FOR DENYING THE WRIT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S POST-JUDGMENT MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Petitioner argues that he has a right to amend his complaint because only non-responsive pleadings have been filed by the defendants. Petitioner has mischaracterized the issue presented. The question raised in this action is whether Petitioner has a right to amend his complaint once the court has entered a judgment of dismissal.

Petitioner has no right to file an amended complaint once a judgment of dismissal has been entered. Whether leave to amend will be granted is within the discretion of the trial court. *Hurd* v. *Dimento,* 440 F.2d 1322, 1323 (1st Cir. 1971), *cert. denied,* 404 U.S. 862, *reh. denied,* 404 U.S. 961 (1971).

Since judgment has already been entered, Petitioner must reopen or vacate the judgment before a motion to amend the complaint can be entertained. *Chrysler Corp.* v. *Lakeshore Commercial Finance,* 66 F.R.D. 607, 608 (E.D.Wis. 1975). Therefore, the district court properly treated Petitioner's motion as a motion to vacate the judgment pursuant to Fed. R. Civ. Pro. 59(e) and as a motion to amend the complaint. Fed. R. Civ. Pro. 59(e) requires a motion to vacate or alter the judgment to be made within ten days of entry of judgment. Under Fed. R. Civ. Pro. 6(b), the district court has no discretion to extend the

ten-day period in which the motion can be made. *Motteller* v. *J. A. Jones Construction Co.*, 447 F.2d 954, 955 (7th Cir. 1971).

Petitioner presented his motion to amend the complaint twenty-one days after entry of judgment. Accordingly, the district court denied the motion as untimely made. Thus, the district court's denial of Petitioner's motion was mandated by Fed. R. Civ. Pro. 6(b) and was not an abuse of discretion.

II.

COUNT 53 OF PETITIONER'S COMPLAINT DOES NOT STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED AGAINST THE COMMISSION

Petitioner argues that the Commission has denied him due process and equal protection of the law by exonerating six attorneys whom he has charged with professional misconduct. The regulation of the practice of law is a function of state government. Petitioner has no right under the Federal Constitution to require the Commission to process his complaint. *Saier* v. *State Bar of Michigan*, 293 F.2d 756, 759 (6th Cir. 1961), *cert. denied*, 368 U.S. 947 (1961). The only right which Petitioner has is the right to complain to the Commission. The Commission does not have a duty to recommend discipline in every case. ILL. ANN.STAT. ch. 110A, §§751 *et seq.* (Smith-Hurd). As a result, the district court properly found that Petitioner's complaint did not state a cause of action upon which relief could be granted.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

Catherine M. Littrell, Senior Law Student, licensed pursuant to Rule 711 of the Supreme Court of Illinois, University of Illinois, assisted in the research and preparation of this brief.

No. 80-1059

In The

Supreme Court of the United States

October Term, 1980

LESLIE H. ALLOTT, JR.,

Petitioner,

v.

RAYMOND SICINSKI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Whether the district court erred in refusing to entertain petitioner's "motion for leave to file amended complaint," where final judgment had been entered dismissing the action and where no motion to alter or amend the judgment pursuant to F.R.C.P. 59(e) was served within 10 days.

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In The

Supreme Court of the United States

October Term, 1980

LESLIE H. ALLOTT, JR.,

Petitioner,

v.

RAYMOND SICINSKI, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, Raymond Sicinski, et al., respectfully request that this court deny the petition for writ of certiorari filed on December 22, 1980.

This joint brief is filed on behalf of all respondents in this court with the exception of the Illinois Attorney Registration and Disciplinary Commission.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

PETITIONER FAILED TO SERVE A MOTION TO VACATE OR AMEND THE JUDGMENT OF DISMISSAL WITHIN 10 DAYS OF THE ENTRY OF JUDGMENT, AS REQUIRED PURSUANT TO F.R.C.P. 59(e); HENCE, THE COURT OF APPEALS ACTED CORRECTLY IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO ENTERTAIN PETITIONER'S "MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT."

Petitioner's brief to this court sets forth no important procedural, substantive, or constitutional question which would merit review by this court. In essence, petitioner asks this court to relieve him of the consequences of his own negligence in failing to file a motion to vacate the judgment of dismissal within 10 days of the entry of judgment, as required pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. As no important question of law has been raised by the petitioner, the petition for writ of certiorari should be summarily denied.

The record in this case shows that on September 28, 1979, the district court dismissed plaintiff's complaint in its entirety and with prejudice. On the same date, the district court filed a "judgment on decision by the court" with the clerk of the District Court, on form 32, as authorized under Rule 84 of the Federal Rules of Civil Procedure.

Final judgment thus having been entered of record, petitioner had 10 days within which to serve his motion to alter or amend the judgment and seek leave to file his

amended complaint, pursuant to F.R.C.P. 59(e). However, no such motion was filed or served upon defendants within that time.

As the Court of Appeals held, once a judgment of dismissal has been entered by the court, the judgment must be reopened or vacated before an amendment to the complaint will be allowed. *Markert v. Swift & Co.*, 173 F.2d 517, 519 (2nd Cir. 1949); *Chrysler Corp. v. Lakeshore Commercial Finance Corp.*, 66 F.R.D. 607 (E.D. Wis., 1975); *Republic of China v. National City Bank of New York*, 14 F.R.D. 186 (S.D.N.Y., 1953); see *Parks v. Mr. Ford*, 68 F.R.D. 305 (E.D. Pa., 1975); 6A Moore, *Federal Practice*, sec. 59.12(1), p. 59-247; Wright and Miller, *Federal Practice and Procedure*, secs. 2804 and 2817. As provided in Rule 59(e) of the Federal Rules of Civil Procedure, a motion to vacate the judgment *must* be served within ten days of the entry of such judgment. Under Rule 6(b) of the Federal Rules, the district court has no discretion to extend the period within which a Rule 59(e) motion may be made. *Motteller v. J.A. Jones Construction Co.*, 447 F.2d 954, 955 (7th Cir. 1971). As the petitioner failed to file any such motion to vacate the judgment within the statutorily prescribed time period, the trial court necessarily acted correctly in denying leave to file an amended complaint.

Throughout his brief to this court, the petitioner maintains that he had an absolute right to file an amended complaint. This is incorrect because judgment had already been entered in favor of all defendants by the district court. In none of the cases decided by the Seventh Circuit cited by petitioner for this proposition had a judgment order been entered before a motion to file an amended complaint had been made. In *Fuhrer v.*

Fuhrer, 292 F.2d 140 (7th Cir. 1961) dismissal had been granted, but the court had specifically allowed leave to amend. In *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957), the court relied heavily on the fact that the dismissal of plaintiff's complaint was made without notice to the plaintiff and under circumstances such that the plaintiff could not respond to calling of the case for trial. In *LaBatt v. Twomey*, 513 F.2d 641 (7th Cir. 1975), an amended complaint had in fact been filed by the plaintiffs before summary judgment had been granted on the original complaint; this amended complaint had apparently been overlooked or even ignored by the district court when it granted summary judgment in the defendants' favor on the original complaint. The Seventh Circuit, first noting the general rule that " * * * the allegations of the amended complaint superceded those of the original complaint" filed in the case (513 F.2d at 651), found that numerous issues of fact were raised by the allegations contained in the verified amended complaint, and accordingly reversed and remanded for trial.

The decisions from circuit courts of appeal other than the Seventh Circuit which are cited and relied upon by the petitioner in his brief to this court offer no assistance to his argument that petitioner had an absolute right to file an amended complaint. In *Ohio Casualty & Ins. Co. v. Farmers Bank of Clay, Kentucky*, 178 F.2d 570 (6th Cir. 1949), *Dowdy v. Proctor & Gamble Manuf. Co.*, 267 F.2d 827 (5th Cir. 1959), *Breier v. Northern California Bowling Proprietors' Ass'n.*, 316 F.2d 787 (9th Cir. 1963), and *Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975), orders had been entered dismissing the complaint, but final judgment had not been entered at the time of dismissal, as is true in the case at bar. In fact, in *Breier v. Northern California*

Bowling Proprietors Ass'n., 316 F.2d at 789, fn.1, the court specifically noted that:

> The entry of *judgment* dismissing the *action* has been held to terminate the right to amend without leave. *Kelly v. Delaware River Joint Comm'n.*, 187 F.2d 93, 94-95 (3rd Cir. 1951); *Feddersen Motors Inc. v. Ward*, 180 F.2d 519, 523 (10th Cir. 1950); *United States v. Newbury Mfg. Co.*, 123 F.2d 453, 454 (1st Cir. 1941). See also *Clardy v. Duke University*, 299 F.2d 368, 369 (4th Cir. 1962).

In short, the petitioner has raised no issue of law which would require the attention of this court, and the respondents therefore request that the petition for writ of certiorari be denied.

II.

ASSUMING, *ARGUENDO*, THAT THE DISTRICT COURT HAD THE DISCRETIONARY AUTHORITY TO ALLOW PETITIONER TO AMEND HIS COMPLAINT, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER SUCH LEAVE.

Even if it is assumed that the district court had the discretionary power to allow petitioner leave to file an amended complaint, the trial court did not abuse its discretion in the case at bar.

Rule 15(a) allows a party to amend his pleading. The decision of the district judge as to whether to allow an amended pleading lies within his sound discretion and is reviewable only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330, 91 S.Ct. 795, 28 L. Ed. 2d 77 (1971). In making the determination as to whether an abuse of discretion occurred the reviewing court must view the case in the posture in which the trial court acted in ruling on the

motion to amend. *Beeck v. Aquaslide N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977). Consequently, the issue before the circuit court was whether the district court abused its discretion in denying petitioner's motion to file an amended complaint.

The record reveals no such abuse of discretion in the case at bar. First, one of the criteria in deciding whether to allow an amended complaint is whether the amended pleading will cure the deficiencies of the complaint which was dismissed. The amended pleading must be able to withstand a motion to dismiss. *Bernstein v. National Liberty Intern. Corp.*, 407 F.Supp. 709, 715 (E.D. Pa., 1976) and cases cited therein. It is not an abuse of discretion to deny leave to amend where the amended complaint alleges no new facts which would cure previous deficiencies. *Stebbins v. Weaver*, 537 F.2d 939, 941 (7th Cir. 1976); *Byrne v. Kysar*, 347 F.2d 734 (7th Cir. 1965); See also *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972).

As the district court noted, petitioner failed to submit the proposed amended complaint and thus, the trial judge was prevented from making a determination as to whether the amended complaint would have cured the deficiencies of the original complaint. (Appendix at pp. 24a-25a.)

Moreover, it is well settled that leave to amend should not be granted where it is clear that plaintiff would not be entitled to any relief under any statement of the facts which could be proved in support of his claim. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977); *Sarfaty v. Nowak*, 369 F.2d 256, 259 (7th Cir. 1966); *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir. 1961). This court has recognized that one of the criteria in determining whether an amended complaint should

be filed is whether such an amendment is a futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Allowing the petitioner leave to file an amended complaint would have been futile because petitioner cannot plead facts establishing federal jurisdiction over any of the respondents. Simply put, petitioner cannot state a cause of action against any of the defendants-respondents under the theories set forth in the original complaint, no matter what additional facts are alleged. (See Appendix, pp. 32a-61a.)

The district court, therefore, did not err in refusing to grant petitioner leave to file an amended complaint, and the appellate court did not err in affirming this action by the district court.

CONCLUSION

The respondents, Raymond Sicinski, et al., respectfully request this Honorable Court to deny the petition for writ of certiorari filed by the petitioner, Leslie H. Allott, Sr., herein.

Respectfully submitted,

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